Nos. 03-1116 and 03-1120

Supreme Court, U.S.
FILED
SEP 23 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, *et al.*,

Petitioners,

v.

ELEANOR HEALD, *et al.*,

Respondents.

MICHIGAN BEER AND
WINE WHOLESALERS ASSOCIATION,

Petitioner,

v.

ELEANOR HEALD, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF MEMBERS OF THE UNITED STATES CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ROY T. ENGLERT, JR.
ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
1801 K Street, N.W.
Suite 411
Washington, DC 20006
(202) 775-4500

JOHN L. OBERDORFER*
ROBERT C. JONES
MEAGAN T. BACHMAN
COLLEEN HANRAHAN
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, DC 20037
(202) 457-6000

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF THE CONGRESSIONAL AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Sixth Circuit's Decision Is Consistent With Precedent Striking a Balance Between the Dormant Commerce Clause and the Twenty-first Amendment 5

A. Traditional Dormant Commerce Clause Strict Scrutiny Applies to State Exercises of Power Under the Twenty-first Amendment 5

B. Michigan's Laws Discriminate Against Out-of-State Wineries 7

II. The Arguments of Petitioners and Their *Amici* Are Contrary to Precedent and Congressional Action 9

A. Several Decisions By This Court Reject the Argument That the Twenty-first Amendment Repealed the Commerce Clause's Application to Wine 10

B. Congress Has Not Delegated to the States Its Commerce Clause Authority Over Interstate Shipment of Wine 11

i. The Wilson Act Explicitly Requires Uniform Application of State Laws 12

ii. The Webb-Kenyon Act Did Not Delegate Authority to the States to Discriminate Economically 13

TABLE OF CONTENTS – Continued

Page

iii. Nor Did Congress Delegate Commerce Power to the States in Section 2 of the Twenty-first Amendment 17

iv. The Twenty-first Amendment Enforcement Act Contemplates the Enforcement of Only Valid, Nondiscriminatory State Laws 19

III. The Laudable Interest in Protecting Youth Does Not Nullify Application of the Commerce Clause to the Michigan Laws 21

IV. A 2003 FTC Report on Direct Shipment of Wine Lists Many Nondiscriminatory Alternatives to Advance the States' Core Concerns 24

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) ..... *passim*

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 22

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 2, 7, 9, 10, 11

Bowman v. Chicago & N.W. Ry., 125 U.S. 465 (1888) 12

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) 2, 5, 9, 10

California v. LaRue, 409 U.S. 109 (1972) 11

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 7, 10, 11

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) 22

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 5, 6

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) 6, 23

Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) 10, 11

Edenfield v. Fane, 507 U.S. 761 (1993) 22

Edgar v. MITE Corp., 457 U.S. 624 (1982) 5

Heald v. Engler, 342 F.3d 517 (6th Cir. 2003) 2, 8, 22, 30

Healy v. Beer Inst., 491 U.S. 324 (1989) 2, 6, 9, 10

TABLE OF AUTHORITIES – Continued

Page

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 2, 10

Hughes v. Oklahoma, 441 U.S. 322 (1979) 6, 23

Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977) 6, 23

James Clark Distilling Co. v. W. Md. Ry., 242 U.S. 311 (1917) 14

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 11

Leisy v. Hardin, 135 U.S. 100 (1890) 12

License Cases, 46 U.S. (5 How.) 504 (1847) 12, 15

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) ... 21-22

McCormick & Co. v. Brown, 286 U.S. 131 (1932) 15

Mugler v. Kansas, 123 U.S. 623 (1887) 15

New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988) 6, 9, 23

Reno v. ACLU, 521 U.S. 844 (1997) 3, 22, 23

Rhodes v. Iowa, 170 U.S. 412 (1898) 14

Scott v. Donald, 165 U.S. 58 (1897) 13, 15

Shafer v. Farmers Grain Co., 268 U.S. 189 (1925) 5

South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) 16

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 957 (1982) 6, 23

Swedenburg v. Kelly, 358 F.2d 223 (2d Cir. 2004) 8

Swedenburg v. Kelly, 232 F. Supp. 2d 135 (S.D.N.Y. 2002) 8

TABLE OF AUTHORITIES – Continued

Page

Walling v. Michigan, 116 U.S. 446 (1886) 12, 15

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 10, 11

STATUTES

Wilson Act, 27 U.S.C. § 121 ..... *passim*

Webb-Kenyon Act, 27 U.S.C. § 122 ..... *passim*

Twenty-first Amendment Enforcement Act of 2000, 27 U.S.C. § 122a ..... *passim*

Mich. Admin. Code r. 436.1705 (2004) 7

Mich. Admin. Code r. 436.1719 (2004) 7

Mich. Comp. Laws § 436.1203 (2004) 27

N.C. Gen. Stat. § 18B-1001.1 (2004) 25, 26, 27

N.D. Cent. Code § 5-01-16 (1987) 25, 26, 27

N.H. Rev. Stat. Ann. § 178:27 (2003) 25, 26, 27, 28

Neb. Rev. Stat. § 53-123.15 (2004) 25

Neb. Rev. Stat. § 53-124 (2004) 26

Neb. Rev. Stat. § 53-160 (2004) 26

Neb. Rev. Stat. § 53-194.03 (2004) 26

Nev. Rev. Stat. § 369.450 (2003) 25, 27

Nev. Rev. Stat. § 369.490 (2003) 25

S.C. Code Ann. § 61-4-747 (Law. Co-op. 2003) 25, 26

Va. Code Ann. § 4.1-112.1 (Michie 2003) 25, 26, 27

Wyo. Stat. Ann. § 12-2-204 (2003) 25, 26, 27

TABLE OF AUTHORITIES – Continued

Page

RULES

Sup. Ct. R. 37.6 1

LEGISLATIVE MATERIALS

49 Cong. Rec. 700 (1912) 14
49 Cong. Rec. 702 (1912) 16
49 Cong. Rec. 704 (1912) 16
49 Cong. Rec. 705 (1912) 16
49 Cong. Rec. 707 (1912) 17
49 Cong. Rec. 4298 (1913) 15
76 Cong. Rec. 4140 (1933) 16
76 Cong. Rec. 4141 (1933) 18, 19
76 Cong. Rec. 4143 (1933) 19
76 Cong. Rec. 4144 (1933) 19
76 Cong. Rec. 4145-48 (1933) 19
76 Cong. Rec. 4161 (1933) 19
76 Cong. Rec. 4168 (1933) 18
76 Cong. Rec. 4170 (1933) 18, 19
76 Cong. Rec. 4171 (1933) 18, 19
76 Cong. Rec. 4172 (1933) 18
145 Cong. Rec. 6871 (1999) 21
146 Cong. Rec. 9039 (2000) 20
146 Cong. Rec. 9046 (2000) 20

TABLE OF AUTHORITIES – Continued

Page

146 Cong. Rec. 10214 (2000) 20
146 Cong. Rec. 10215 (2000) 20, 21

OTHER AUTHORITIES

ATF, Industry Circular No. 96-3, Direct Shipment Sales of Alcohol Beverages (Feb. 11, 1997), *available at* http://www.atf.treas.gov/pub/ind_circulars/ic_96.3.htm (last visited September 21, 2004) 29

Cooperative Interstate Sales and Use Tax Administration agreement, *available at* http://www.tax.state.ny.us/pdf/publications/Sales/Pub32_1196.pdf (last visited September 21, 2004) 28

E-Commerce: The Case of Online Wine Sales and Direct Shipments: Hearing Before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce, 108th Cong. (2003) 24, 25

Federal Trade Commission Report, "Possible Anticompetitive Barriers to E-Commerce: Wine" (July 2003) ..... *passim*

Maine 2003 Individual Income Tax Form 1040S-ME, *available at* http://www.state.me.us/revenue/incomeestate/homepage.html (last visited September 21, 2004) 28

Michigan 2003 Individual Income Tax Form MI-1040, *available at* http://www.michigan.gov/treasury/0,1607,7-121-1748_1904_1916-70176–,00.html (last visited September 21, 2004) 28

TABLE OF AUTHORITIES – Continued

Page

North Carolina 2003 Individual Income Tax Form D-400, *available at* http://www.dor.state.nc.us/downloads/individual.html (last visited September 21, 2004) 28

Vermont 2003 Individual Income Tax Form IN-111, *available at* http://www.state.vt.us/tax/forms/formsindividual.htm (last visited September 21, 2004) 28

INTEREST OF THE CONGRESSIONAL *AMICI CURIAE*[1]

The Congressional *amici* are a bipartisan group of Senators and Representatives with an interest in the outcome of this case and its effect on the implementation and interpretation of the Twenty-first Amendment Enforcement Act. The Congressional *amici* have a strong interest in the Court's continuing interpretation of the Commerce Clause to prohibit state laws that discriminate against out-of-state commerce, and they oppose state laws that economically discriminate or whose purpose is economic protectionism for in-state businesses.

The Twenty-first Amendment Enforcement Act of 2000, 27 U.S.C. § 122a, gives state attorneys general the power to seek injunctive relief in federal courts against violators of state laws regulating the importation and transportation of intoxicating liquor. Subsection (e) of the Act, "Rules of Construction," guides the federal courts on the jurisdictional question and looks to this Court for interpretation. It provides that federal jurisdiction should be construed to extend only to a "State law that is a valid exercise of power vested in the States ... under the twenty-first article of amendment to the Constitution of the United States as such article of amendment is interpreted by the Supreme Court of the United States including interpretations in conjunction with other provisions of the Constitution of the United States."

Congressional debate on the "Rules of Construction" provision focused on Supreme Court decisions interpreting the purpose and effect of the Twenty-first Amendment in light of the Commerce Clause. Specifically mentioned with

---

[1] A list of the individual members of Congressional *amici* is included in the Appendix. Pursuant to Sup. Ct. R. 37.6, the Congressional *amici* affirm that this brief has been prepared solely by counsel for the *amici*. The Coalition for Free Trade and Family Winemakers of California made monetary contributions for the preparation and submission of this brief. Letters from all parties consenting to the filing of this brief have been filed with the Clerk.

approval during debate were *Bacchus Imports, Ltd. v. Dias* and other cases holding that the Twenty-first Amendment did not repeal the Commerce Clause as it applies to intoxicating liquor, and that the Twenty-first Amendment, therefore, must be considered in the context of Congress' power to regulate interstate commerce.[2] The cases now before the Court will define the relationship between the Commerce Clause and the Twenty-first Amendment and the scope of the laws to restrict the importation of intoxicating liquor states can enforce pursuant to the Twenty-first Amendment Enforcement Act.

SUMMARY OF ARGUMENT

The Court's decisions establish that, in exercising authority to regulate the importation of alcohol for use and distribution within its borders, a state may not discriminate against or burden interstate commerce unless it can show that the discriminatory aspects of its laws and regulations advance one of the core concerns of the Twenty-first Amendment and there is no reasonable, nondiscriminatory alternative. Michigan cannot meet either burden.

Petitioners and *amici* advance several arguments in their challenge to the precedent and constitutional jurisprudence that support the Sixth Circuit's discussion in *Heald v. Engler*.[3] They contend that, in enacting the Wilson and Webb-Kenyon Acts, Congress delegated to the states the authority to regulate the importation and transportation of alcohol in any way they saw fit, including discriminating against interstate shipments. But the plain language and legislative histories of the Wilson Act, the Webb-Kenyon Act, and the Twenty-first Amendment

[2] *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

[3] 342 F.3d 517 (6th Cir. 2003).

Enforcement Act make clear that Congress did not do so. The Wilson Act of 1890, by its express terms, does the opposite of authorizing discrimination against interstate commerce. It reversed the "Original Package Doctrine," subscribes to uniformity of treatment, and authorizes states to exercise their police powers to restrict the importation of alcoholic beverages "to the same extent *and in the same manner* as though such liquids or liquors had been produced in such state or territory." *Id.* (emphasis added).

The Webb-Kenyon Act of 1913 continued Congress' objective of authorizing states to regulate in-state and out-of-state products evenhandedly. By passing the Twenty-first Amendment, Congress did not seek to depart from the uniformity between in-state and out-of-state interests that it had mandated in the earlier statutes; section 2 of the Twenty-first Amendment enshrined that nondiscriminatory intent in the Constitution.

The Twenty-first Amendment Enforcement Act of 2000, which most of the Congressional *amici* signing this brief voted for, authorizes state attorneys general to seek injunctions in federal court to enforce state anti-liquor laws. But Congress set limits; federal jurisdiction is available *only* if the laws are valid exercises of power under the Twenty-first Amendment as "interpreted by" this Court, "including interpretations in conjunction with other provisions of the Constitution." The Act's directive that it not "be construed to grant to States any additional power" is a powerful reaffirmation that Congress has not delegated authority to the states to discriminate against out-of-state shipments of wine.

Some *amici* seek to deflect the focus of the argument to the dangers of youth access to alcohol in general, rather than the precedent and constitutional jurisprudence that should govern this case. In *44 Liquormart, Inc. v. Rhode Island*, *Reno v. ACLU*, and other cases, the laudable goal of protecting youth collided with other constitutional provisions. This Court's approach in First Amendment and Commerce Clause cases has been to protect the constitutional value, whether it be commercial speech or interstate

commerce, by placing the burden of proof on the proponent of the statutory restriction. The proponent must demonstrate that the measures are necessary to achieve the legitimate goals and that there is no less discriminatory or restrictive alternative that achieves the statute's goals. Michigan's law fails both tests.

First, the discriminatory aspects of Michigan's provisions violate the Commerce Clause by permitting in-state wineries to make direct shipments to consumers, while barring out-of-state wineries from doing so, or making it more burdensome for them to do so. In-state wineries are permitted to ship their products directly to consumers, but Michigan requires out-of-state wineries to ship to licensed wholesalers, and it bans their direct shipments to Michigan consumers. Out-of-state wineries must pay twelve times more ($300) for a license to sell to a Michigan wholesaler than in-state wineries. The discriminatory Michigan statutes and regulations do not square with its valid interest in protecting youth against consumption of alcoholic beverages.

Second, there are ample nondiscriminatory means to achieve Michigan's goals. A 2003 Federal Trade Commission report found that any marginal advancement in youth protection or other core Twenty-first Amendment concerns achieved by a discriminatory ban could be achieved in a less discriminatory manner. The FTC identified more than twenty states that permit interstate direct wine shipping and found that many have adopted nondiscriminatory alternatives for regulating direct shipping by out-of-state wineries. According to the Report, states "experience[ ] few, if any, problems with interstate direct shipment of wine to minors."[4] Those less restrictive alternatives include: (1) permit or license requirements for out-of-state shippers, including mandatory remittance of taxes; (2) labeling and delivery requirements that ensure that wine is delivered only to adults; (3) enforcement mechanisms,

[4] Federal Trade Commission Report entitled "Possible Anticompetitive Barriers to E-Commerce: Wine" (2003) ("FTC Report") at 4.

including stiff penalties for violations of state direct shipment laws; (4) state cooperatives for interstate use tax collection; and (5) use tax reporting requirements on state income tax forms.

The undersigned Members of Congress share the view that neither the Twenty-first Amendment nor any other federal legislation gives the states authority to discriminate against out-of-state alcohol for the purpose of economic protectionism.

ARGUMENT

I. The Sixth Circuit's Decision Is Consistent With Precedent Striking a Balance Between the Dormant Commerce Clause and the Twenty-first Amendment.

In exercising authority to regulate the importation of alcohol for use and distribution within its borders, a state may not discriminate against or burden interstate commerce unless it can show that the discriminatory aspects of its laws and regulations advance one of the core concerns of the Twenty-first Amendment and there is no reasonable, nondiscriminatory alternative. The Sixth Circuit correctly determined, under a traditional dormant Commerce Clause analysis, that Michigan's laws unconstitutionally discriminate against out-of-state wine shippers.

A. Traditional Dormant Commerce Clause Strict Scrutiny Applies to State Exercises of Power Under the Twenty-first Amendment.

Under *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986),[5] a state statute that directly regulates or discriminates against interstate commerce, or has the effect of favoring in-state

[5] Citing *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925); and *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (plurality opinion).

economic interests over out-of-state interests violates the Commerce Clause. A discriminatory statute may stand but only if the state can demonstrate that the discrimination advances a legitimate local purpose that cannot be served by a reasonable, nondiscriminatory alternative. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). The proponent state must demonstrate, however, that the discriminatory aspects of the statute specifically advance that legitimate local purpose. *See id.* at 279-80. States have substantial latitude to regulate commerce within their respective borders so as to promote the health and safety of their citizens, but their efforts remain subject to the dormant Commerce Clause:

> [A] finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Such a view . . . "would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods."

Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 350 (1977) (quoting *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951)).[6]

Traditional dormant Commerce Clause strict scrutiny is appropriate for state statutes and regulations that discriminate against out-of-state wine shippers. Where, as here, laws facially discriminate and a state is unable to establish that its asserted goal could not be achieved in a nondiscriminatory manner, its invalidity is conclusively established, "despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989)

[6] *See also City of Philadelphia*, 437 U.S. at 626-27; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957 (1982); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

(Scalia, J., concurring). In the context of the Twenty-first Amendment, a statute that is determined to be discriminatory in purpose or effect may be a permissible exercise of state authority only if the interests implicated by the state regulation are closely related to one of the core values of the Twenty-first Amendment – temperance, raising revenue, or orderly markets – and there is no reasonable nondiscriminatory alternative. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984). Michigan's laws do not meet either test.

B. Michigan's Laws Discriminate Against Out-of-State Wineries.

The Michigan laws economically discriminate in purpose and effect by differentiating between in-state and out-of-state wineries. Michigan maintains a three-tier distribution system for wine and beer, requiring that licensed manufacturers sell to licensed wholesalers, which then sell to licensed Michigan retailers. Retailers then sell the wine and beer to Michigan consumers. Michigan requires that out-of-state wineries that produce and bottle their own wine obtain an "outstate seller of wine license" to be able to deliver, ship, or transport their wine into Michigan. *See* Mich. Admin. Code r. 436.1705(2)(d) (2004) (governing "outstate seller of wine licenses"). However, the holder of an "outstate seller of wine license" may ship its product only to a licensed wholesaler in Michigan, with the only exception being on written order otherwise from the Michigan Liquor Control Commission. Mich. Admin. Code r. 436.1719(5) (2004). There is no procedure to obtain a written exception to the requirement that an out-of-state winery ship its product only to a licensed wholesaler. Brief of Petitioners Michigan State Officials ("Michigan Br.") at 8. In reality, then, an out-of-state winery never may ship its product directly to a Michigan consumer. *Id.* In contrast, Michigan wineries may bypass the three-tier system to sell their wine at retail and deliver it directly to Michigan consumers. *Id.* at 7, 8. To sell wine to a Michigan

wholesaler, an out-of-state winery must pay twelve times ($300) the amount that in-state wineries pay ($25) to be able to ship directly to consumers. *Heald v. Engler*, 342 F.3d 517, 521 (6th Cir. 2003).[7]

Acknowledging the differences between its treatment of in-state and out-of-state wineries, Michigan defends on the grounds that its "regulatory framework" as a whole "clearly serves valid regulatory purposes of 'promoting temperance,' 'controlling the distribution of liquor,' and 'raising revenue.'" Michigan Br. at 32. Michigan asserts that it has chosen to permit in-state wineries to bypass the three-tier system because Michigan can still collect taxes and assess meaningful sanctions for noncompliance with its alcohol and beverage control laws, Michigan Br. at 7, and that "[t]he point of Michigan's system is that it addresses Michigan's need to protect its citizens by preventing the sale of alcohol to minors while promoting responsible drinking and to ensure the collection of taxes." *Id.* at 33. These generalized explanations, however, fail to provide any evidence that the *discriminatory aspects* of Michigan's regulatory system – *i.e.*, permitting in-state wineries to ship directly, but effectively prohibiting out-of-state

[7] The Sixth Circuit correctly held that all of these differentials combined to benefit in-state wineries and burden out-of-state wineries and noted that:

> Michigan wineries enjoy both greater access to consumers who wish to have wine delivered to their homes, and greater profit through their exemption from the three-tier system. Out-of-state wineries, on the other hand, must participate in the costly three-tier system, to their economic detriment and, although this is not clear from the record, may be shut out of the Michigan market altogether if unable to obtain a wholesaler.

Heald, 342 F.3d at 525. In contrast, the Second Circuit erred in *Swedenburg v. Kelly*, 358 F.2d 223 (2d Cir. 2004), also before this Court for review in No. 03-1274, when it ignored the acknowledged economic protectionist purpose and effect of New York's laws and held them to be constitutional. *See Swedenburg v. Kelly*, 232 F. Supp. 2d 135, 146 (S.D.N.Y. 2002) (New York's Attorney General acknowledged that economic protectionism was the purpose of the in-state farm winery exception to its ban on direct shipments of wine).

wineries to do so – themselves advance any of the core values of the Twenty-first Amendment.

Michigan's argument that it may still advance these core values of the Twenty-first Amendment, *notwithstanding* the benefits it accords to in-state wineries, misses the point. As *Bacchus*, *New Energy*, *Brown-Forman*, and Justice Scalia's concurrence in *Healy* make clear, the test is whether the discriminatory aspects of the statute advance those legitimate goals, not whether those goals may still be met without reference to the special treatment for in-state wineries. Also, despite Michigan's failure to demonstrate that the benefits it accords in-state wineries advance core concerns of the Twenty-first Amendment, Michigan has several nondiscriminatory alternatives available to it to achieve its legitimate regulatory goals. *See* Part IV *infra*.

II. The Arguments of Petitioners and Their *Amici* Are Contrary to Precedent and Congressional Action.

Petitioners and *amici* make several arguments to avoid the force of the Court's decisions. They argue that the discriminatory aspects of Michigan and New York's regulatory schemes constitute legitimate exercises of power under the Twenty-first Amendment.[8] They contend that the Twenty-first Amendment removed state alcohol regulation from the purview of the dormant Commerce Clause and Congress delegated its commerce authority to the states to regulate alcohol in any rational manner, therefore strict scrutiny does not apply to these statutes

[8] *See* Brief of Petitioner Michigan Beer & Wine Wholesalers Association ("Michigan Beer & Wine Wholesalers Br.") at 20-22, 24-34, Michigan Br. at 15-30, *Amicus Curiae* Brief of Ohio and 32 Other States ("Ohio Br.") at 12-17, and *Amicus Curiae* Brief of the National Alcohol Beverage Control Association and the National Conference of State Liquor Administrators ("NABCA Br.") at 10-12.

and regulations.[9] These arguments are contrary to the controlling decisions of this Court and Congressional action mandating otherwise.

A. Several Decisions By This Court Reject the Argument That the Twenty-first Amendment Repealed the Commerce Clause's Application to Wine.

The Twenty-first Amendment did not elevate the states' authority above the Commerce Clause or any other provision of the Constitution.[10] *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), rejected as an "absurd oversimplification" the notion that the Twenty-first Amendment had "somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquor is concerned" and observed that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." 377 U.S. at 331-32.[11]

[9] *See* Michigan Beer & Wine Wholesalers Br. at 18-20, Michigan Br. at 36-38, Ohio Br. at 17-18, NABCA Br. at 12-14, Brief of *Amicus Curiae* the Wine and Spirits Wholesalers of America, *et al.* ("Wine and Spirits Wholesalers Br.") at 20-21, and Brief of *Amicus Curiae* National Beer Wholesalers Association ("NBWA Br.") at 6-7.

[10] *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

[11] As petitioners and *amici* concede, laws passed in an exercise of Twenty-first Amendment powers remain subject to other constitutional provisions, such as the Export-Import Clause, the First Amendment, the Equal Protection Clause, and the Due Process Clause. *See, e.g., Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Export-Import Clause); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S.

(Continued on following page)

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), affirms that laws passed in an exercise of Twenty-first Amendment powers remain subject to the dormant Commerce Clause. The *Bacchus* majority observed that

> [d]oubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. . . . State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.

Id. at 276. Likewise, a unanimous Court in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984),[12] relied upon years of precedent in holding that the Twenty-first Amendment "does not license states to ignore their obligations under other provisions of the Constitution."

Together, these decisions reject the notion that the Twenty-first Amendment removed state regulation of alcohol from the purview of the dormant Commerce Clause.

B. Congress Has Not Delegated to the States Its Commerce Clause Authority Over Interstate Shipment of Wine.

Congress has not delegated authority to the states to discriminate economically in the field of alcohol regulation. On the several occasions it has enacted legislation regarding state regulation of intoxicating beverages, Congress has done the opposite of authorizing state discrimination. In the early laws, Congress rectified an

484 (1996) (First Amendment); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (Equal Protection Clause).

[12] Citing *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982); *California v. LaRue*, 409 U.S. 109, 115 (1972); *Constantineau*, 400 U.S. at 436; and *James B. Beam Distilling Co.*, 377 U.S. at 345-46.

imbalance that left interstate shipments freer from state regulation than intrastate shipments. The foundation of this legislation was uniformity. Congressional concern with uniform treatment of in-state and out-of-state alcoholic beverages continues to the preseht day.

i. The Wilson Act Explicitly Requires Uniform Application of State Laws.

In 1890, Congress enacted the Wilson Act,[13] to address the peculiar disparity between treatment of domestic and interstate alcohol that had grown out of court decisions. During the nineteenth century, states could exercise their local police power to regulate alcoholic beverages within their borders and to prohibit the in-state manufacture and sale of alcohol, but could not use that power to discriminate in favor of in-state products. *See License Cases*, 46 U.S. (5 How.) 504 (1847); *Walling v. Michigan*, 116 U.S. 446, 454 (1886). At the same time, however, states were prevented from prohibiting shipments from outside the state that were resold within the state in their original packages (the "Original Package Doctrine"). *See Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890). These decisions had the anomalous effect of discriminating in favor of out-of-state alcohol sellers because states could forbid domestic production of alcohol but could not stop alcohol imports. In response, Congress enacted the Wilson Act to empower the states to impose the same regulation on imported alcohol as domestic alcohol.

The Wilson Act insists on uniformity of treatment for in-state and out-of-state liquor shipments:

> [a]ll . . . intoxicating liquors transported into any state or territory, . . . shall upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, *to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory*, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

27 U.S.C. § 121 (emphasis added). In upholding the constitutionality of the Wilson Act, the Court held that its purpose was to resolve the conflict created by the Original Package Doctrine between the immunity accorded interstate goods under the dormant Commerce Clause and the states' police power:

> [s]o long, however, as state legislation continues to recognize wines, beer, and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the federal courts to afford to such use and commerce the *same measure of protection, under the constitution and laws of the United States, as is given to other articles.*

Scott v. Donald, 165 U.S. 58, 91 (1897) (emphasis added). *Scott* underscored that the Wilson Act was to be nondiscriminatory; it "was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are, therefore, the subjects of legitimate commerce." *Id.* at 100.[14]

ii. The Webb-Kenyon Act Did Not Delegate Authority to the States to Discriminate Economically.

The same nondiscrimination principles are preserved in the Webb-Kenyon Act.[15] The Webb-Kenyon Act was

---

[13] Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121).

[14] The Wilson Act remains in effect, and this Court has never questioned the continuing validity of *Scott*.

[15] First enacted in 1913, Act of Mar. 1, 1913, c. 90, § 1, 37 Stat. 699 (codified as 27 U.S.C. § 122) and re-enacted without change again in 1935, Act of Aug. 27, 1935, c. 740, § 202(b), 49 Stat. 877.

enacted to close a loophole forcing dry states to allow the importation of alcohol shipped interstate. In the wake of the Wilson Act, the Supreme Court had held a state's power to prevent the sale of alcohol in its original package in violation of its laws did not attach until receipt and delivery to the consignee of the alcohol shipped from another state. *Rhodes v. Iowa*, 170 U.S. 412, 426 (1898). To remedy the problem faced by the dry states, Congress once more reacted, this time with the Webb-Kenyon Act. It was "enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws. . . . " *James Clark Distilling Co. v. W. Md. Ry.*, 242 U.S. 311, 323-24 (1917). Senator Sanders spoke to the gap left by the Wilson Act and the purpose of the Webb-Kenyon Act:

> As it is a State can protect its citizens against one another, but not against outsiders. A State can regulate the quality of liquor sold within the State, but it can not regulate the quality of liquor sold from outside the State. . . . There is here an invasion of State rights and a helplessness of States to protect themselves. They must therefore look to the National Government for relief. That is the object of this bill.

49 Cong. Rec. 700 (1912).

In passing the Webb-Kenyon Act, therefore, Congress sought only to assist the states in exercising their local police power to ensure compliance with state laws proscribing the sale of liquor, by permitting that power to attach to items shipped interstate before receipt by and delivery to the end-user. There is no indication that Congress intended to allow states to discriminate economically against interstate alcohol. To the contrary, the Webb-Kenyon Act, like its predecessor the Wilson Act, was intended to maintain regulatory parity for alcoholic beverages produced within the state and outside the state.

The Webb-Kenyon Act was enacted against the backdrop of the nondiscrimination principles highlighted in the text of the Wilson Act and the Court's decisions in *Scott v. Donald*, 165 U.S. 58 (1897), *License Cases*, 46 U.S. (5 How.) 504 (1847), *Mugler v. Kansas*, 123 U.S. 623 (1887), and *Walling v. Michigan*, 116 U.S. 446, 454 (1886). All established that under their police power, states could regulate the local manufacture and sale of alcohol, but could not use that power to discriminate in favor of in-state products. As Senator Williams explained during debate over passage of the Webb-Kenyon Act,

> Congress has just as much power to prescribe that the termination of an interstate transaction shall be at the State line as it has to prescribe that it shall cease at the consignee's door. The only reason the Supreme Court ever held otherwise was because Congress had not passed any act regulating interstate commerce upon this subject in such a way as to give the courts the right so to decide. . . . I think wherever Congress in the exercise of its power to regulate interstate commerce can exercise the power so as to be aidful and helpful to the States in the exercise of their police powers, that it ought to do so, and wherever possible not exercise it so as to restrict and restrain the States in the exercise of their police powers.

49 Cong. Rec. 4298 (1913). These principles were confirmed in *McCormick & Co. v. Brown*, 286 U.S. 131, 141 (1932), which held that "there is no reason for denying to the Webb-Kenyon Act its intended application to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the states' valid prohibitions" enacted pursuant to the states' police powers reserved to them under the Tenth Amendment.

Despite the clear purpose of the Webb-Kenyon Act, petitioners and *amici* suggest that, in enacting it, Congress intended to remove state regulation of alcohol

from the purview of the dormant Commerce Clause.[16] But "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be *unmistakably clear*." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984) (emphasis added). The debates surrounding the Webb-Kenyon Act, certainly do not evidence such "unmistakably clear" intent to delegate. To the contrary, the debates suggest that state regulation was not removed from the reach of the dormant Commerce Clause. Senator McCumber emphasized the absence of any such delegation:

> If the act is made clear that we do not put into effect a State law when the commodities arrive in such State or *do not delegate our authority in any manner to the State*, but simply provide a condition under which the commodity may lose its commercial [immunity] character, and thereby become subject to the laws of the State, the second section may be so framed as to be held constitutional.

49 Cong. Rec. 702 (1912) (emphasis added).[17] Such an understanding did not change over time. *See* 76 Cong. Rec. 4140 (1933) (Statements of Senators Wagner and Blaine in debating passage of the Twenty-first Amendment that, in

[16] *See* Michigan Beer & Wine Wholesalers Br. at 19-20, Michigan Br. at 36-38, Ohio Br. at 17-18, NABCA Br. at 12-14, Wine and Spirits Wholesalers Br. at 20-21, and NBWA Br. at 6-7.

[17] *See also* 49 Cong. Rec. 702 (1912) (Statement of Sen. McCumber that "imposing the condition that the goods shall be so subjected to the laws of a State is not in any sense whatever delegating authority to the State to control by its legislation interstate commerce"); *id.* at 704-05 (Statement of Sen. McCumber comparing the Webb-Kenyon Act with an act prohibiting interstate commerce in birds or animals killed in any state violation of that state's law and observing, "I hardly think anyone would contend that this prohibition is a delegation of authority to the State. It is simply a condition under which the shipment may or may not be made"); *id.* at 705 (Statement of Sen. McCumber: "[Congress] does not delegate its power to a State. It recognizes its own authority over the article as an article of interstate commerce and says it is no longer a subject of commerce, and being no longer a subject of commerce it falls of itself under the Laws of the State in which it is then located.").

enacting the Webb-Kenyon Act, Congress did not delegate to the States the power to regulate interstate commerce, but instead "Congress itself regulated interstate commerce to the point of removing all immunities of liquor in interstate commerce"). As Senator Kenyon, one of the Act's sponsors, stated, "its purpose, *and its only purpose*, is to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic and control of intoxicating liquors within their borders." 49 Cong. Rec. 707 (1912) (emphasis added). Rather than expressing an "unmistakable intent" to remove state regulation of alcohol from the reach of the dormant Commerce Clause, then, Congress displayed its intent that state regulation continue to be subject to it.

iii. Nor Did Congress Delegate Commerce Power to the States in Section 2 of the Twenty-first Amendment.

Like the Wilson and the Webb-Kenyon Acts, the Twenty-first Amendment was passed to remove impediments to the states' nondiscriminatory exercise of their police power over all alcohol – this time by repealing Prohibition and the overreaching federal police power that attended it and assuring that dry states could enforce their valid police powers to prohibit interstate liquor in the same manner as in-state liquor. There is no evidence in the legislative history of the Twenty-first Amendment that Congress intended section 2 to permit the states to enforce economically discriminatory laws. Rather, the history points to the purpose of section 2 as being to assure dry states that they could constitutionally and effectively exercise their police powers by treating interstate liquor the same as in-state liquor. According to Senator Borah, a dry-state senator,

> the eighteenth amendment would never have been adopted had it not been for the open, brazen, corrupt, persistent defiance of the laws of the dry States by the liquor interests outside those States. At the time the eighteenth amendment was

adopted, 33 States had prohibition in some form. The people had declared they wanted to be rid of this evil, or at least to control it in their own way. These States were invaded, their laws broken, their officials corrupted, by the same influences which now plead for States rights and local control. They did not at that time respect that right at all. They trampled upon it and scoffed at it. Therefore, if we are to have what we are now promised, local self-government, States rights, the right of the people of the respective States to adopt and enjoy their own policies, we must have some other method, some other provisions of the Constitution, than those which existed prior to the adoption of the eighteenth amendment.

All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently in the Constitution of the United States.

76 Cong. Rec. 4172 (1933).[18] Instead of granting to the states *carte blanche* to discriminate economically, section 2 of the Twenty-first Amendment enshrined the Webb-Kenyon Act in the Constitution, thereby assuring dry states that they could exercise their police powers to prohibit the sale of liquor within their borders.[19]

[18] *See* 76 Cong. Rec. 4141 (1933) (Statement of Sen. Blaine: "So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line . . . [T]he pending proposal will give the States that guarantee."). *See also* 76 Cong. Rec. 4168 (1933) (Statement of Sen. Fess: "In other words, the second section of the joint resolution that is now before us is designed to permit the Federal authority to assist the States that want to be dry to remain dry.").

[19] *See* 76 Cong. Rec. 4170 (1933) (Statement of Sen. Borah); 76 Cong. Rec. 4171 (1933) (Statement of Sen. Wagner); 76 Cong. Rec. 4172 (1933) (Statements of Senators Lewis and Borah), expressing the same sentiment.

This Congressional concern with effective uniform enforcement of state police power was highlighted in the debate surrounding a proposed, but ultimately rejected, section 3 of the Twenty-first Amendment.[20] The problem with proposed section 3 was that – because federal law is supreme – there could be no actual "concurrent" exercise of police power by the federal and state governments with regard to saloons. Therefore, the federal government could continue to interfere with wholly local police power in regulating local use and distribution of alcohol. As Senator Wagner put it, proposed section 3 would "not restore to the States responsibility for their local liquor problem. It does not withdraw the Federal Government from the field of local police regulation into which it has trespassed." 76 Cong. Rec. 4144 (1933).[21]

iv. The Twenty-first Amendment Enforcement Act Contemplates the Enforcement of Only Valid, Nondiscriminatory State Laws.

In 2000, Congress enacted the Twenty-first Amendment Enforcement Act.[22] It provides federal jurisdiction for state attorneys general seeking injunctive relief for violations of state alcohol laws regulating the importation and transportation of intoxicating liquor. 27 U.S.C. § 122a(c). That federal jurisdiction is available only for state laws that constitute valid exercises of power vested in the states under the Twenty-first Amendment, as "interpreted

[20] "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4141 (1933) (Statement of Sen. Blaine).

[21] Other Senators identified the same problem with proposed section 3. *See* 76 Cong. Rec. 4143 (1933) (Statement of Sen. Wagner); 76 Cong. Rec. 4145-48 (1933) (Statements of Sen. Wagner); 76 Cong. Rec. 4161 (1933) (Statement of Sen. Norris); 76 Cong. Rec. 4170-71 (1933) (Statement of Sen. Borah).

[22] 27 U.S.C. § 122a.

by the Supreme Court of the United States including interpretations in conjunction with other provisions of the Constitution of the United States." 27 U.S.C. § 122a(e)(1). The Twenty-first Amendment Enforcement Act "shall not be construed to grant to States any additional power." 27 U.S.C. § 122a(e)(2). In other words, federal jurisdiction is available only for those state laws that do not violate any other provision of the Constitution, including the dormant Commerce Clause.

The requirement that state laws be otherwise constitutional is manifest in the debates leading to enactment. Senator Feinstein, a member of the Senate Judiciary Committee, made clear that

> this provision is simply a jurisdictional statute with a very narrow and specific purpose. The bill is not intended to allow the enforcement of invalid or unconstitutional State liquor laws in the Federal courts, and is certainly not intended to allow States to unfairly discriminate against out-of-State sellers for the purposes of economic protectionism.

146 Cong. Rec. 10214 (2000). Senator Feinstein further expressed the view that the Twenty-first Amendment Enforcement Act is premised on those many Supreme Court cases holding that the Twenty-first Amendment "does not diminish the force of the supremacy clause, the establishment clause, the export-import clause, the equal protection clause, and, again, the commerce clause; nor does it abridge rights protected by the first amendment." *Id.* at 10215.[23] The amendment to the bill encompassing

[23] *See also* 146 Cong. Rec. 9046 (2000) (Statement of Rep. Radanovich that previous versions of the Twenty-first Amendment Enforcement Act would have permitted states to discriminate unfairly against out-of-state sellers for economic protectionist purposes, but "[s]uch protectionism would clearly be a violation of the Commerce clause of the Constitution; thus, the current version of this legislation does not allow for such protectionist acts"); 146 Cong. Rec. 9039 (2000) (Statement of Rep. Hyde, Chair of the House Judiciary Committee, affirming that the rules of construction language "is an implicit recognition of the

(Continued on following page)

this understanding was passed by a unanimous voice vote in the Senate committee and became subsection (e) of the enacted Twenty-first Enforcement Act. *Id.*

III. The Laudable Interest in Protecting Youth Does Not Nullify Application of the Commerce Clause to the Michigan Laws.

Ignoring decades of Court decisions, some *amici* attempt to divert the Court's attention toward the broad issue of youth access to alcohol rather than the questions of whether the Michigan laws materially advance the state's asserted legitimate goals and whether there are less restrictive alternatives available.[24] The decisions that *amici* ignore hold that a state's asserted interest in temperance does not trump constitutional provisions, including traditional Commerce Clause concerns, when less restrictive alternatives for accomplishing a state's asserted goal exist.

First Amendment jurisprudence provides a helpful framework within which to evaluate the many problems with *amici's* approach. First Amendment precedent has long required that states, in exercising their power to limit youth access to harmful materials, narrowly tailor their restrictions so that free speech is burdened in only the most limited ways. *See 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 507 (1996); *see also Lorillard Tobacco*

Supreme Court decisions made over the last 35 years holding that the 21st [sic] Amendment cannot be read in isolation from other provisions contained in the U.S. Constitution"); 145 Cong. Rec. 6871 (1999) (Statement of Rep. Conyers: "neither this act nor Webb-Kenyon are in anyway designed to supersede any other provision of the Constitution, such as the first amendment or the Commerce clause (including the so-called 'dormant' Commerce clause). In this regard, the amendment reaffirms the Supreme Court's 1984 decision in *Bacchus Imports* [sic] *v. Dias,* 468 U.S. 263 (1984), which held that a state law which imposed an excise tax on sales of liquor but exempted certain locally produced alcoholic beverages violated the Commerce clause.").

[24] *See* Ohio Br. at 22-24 and *Amicus Curiae* Brief of Michigan Association of Secondary School Principals, *et al.* ("MASSP Br.") at 5-22.

Co. v. Reilly, 533 U.S. 525, 563 (2001). A state's asserted interest in promoting temperance under the Twenty-first Amendment clashed with the First Amendment in *44 Liquormart*. There, this Court reviewed Rhode Island statutes prohibiting the advertising of alcoholic beverage prices. As in *Heald*, Rhode Island's asserted interest was to promote temperance. *Id.* at 504. *44 Liquormart* held that the statutes unconstitutionally restricted protected speech for two reasons.

First, the state failed to demonstrate that its regulations would advance the state's interest and, second, the state failed to show that the statutes were narrowly tailored. *Id.* at 505-07. Rhode Island's expressed interest in protecting youth was not the end of the analysis. Rather, if a state regulation merely mitigated the harm the state sought to remedy, the regulation would not pass muster. *See id.* at 505. Specifically, "a commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the government's purpose.'" *Id.* (quoting *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980)). A state, therefore, has the burden of showing not only that its direct-shipment restrictions will advance temperance, but that they will do so "to a material degree." *See Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

The balancing articulated by *44 Liquormart* is not a constitutional anomaly. A number of other First Amendment cases hold that speech considered harmful when directed toward children may not be curtailed if, on balance, the regulation unduly burdens speech that adults may legally receive. *See Reno v. ACLU*, 521 U.S. 844, 875 (1997). *See also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002) ("The precedents establish . . . that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.").

Reno v. ACLU struck down the Communications Decency Act ("CDA"), holding that the statute did not offer the least restrictive means of achieving the government's goals. 521 U.S. at 876-79. While recognizing that the government's interest in safeguarding the well-being of children was compelling and justified, *id.* at 869-70, this Court nonetheless declared the content-based regulation to be unconstitutional because it was not narrowly tailored to further that interest. *Id.* at 879. The Court recited strict scrutiny's "least restrictive means" test: "[The] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Id.* at 874. The Court invalidated the CDA because it did not employ devices that would restrict youth access, while at the same time permit adults to receive non-obscene speech. *Id.* at 876-79.

Likewise, a state law or regulation complies with the dormant Commerce Clause if it materially advances an asserted state interest, and does so through the least restrictive means. *See New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957 (1982); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). The test of the constitutionality of the Michigan statute under the dormant Commerce Clause should parallel the analysis in *44 Liquormart*. As a threshold matter, because the direct shipment scheme burdens only out-of-state interests, leaving in-state shipments virtually unobstructed, the benefits achieved through the legislation are doubtful. The risk that minors will have greater access to alcohol via direct shipment is not alleviated by placing disparate burdens on out-of-state producers while allowing for direct-shipment of in-state wine.

To the extent that concern about youth access is advanced as a reason to prevent out-of-state wineries from shipping their products, Michigan ignores that its regulations prevent adults from obtaining certain wines that may be available to them only through direct shipment from the winery. To paraphrase, the kind of beverages available to adults cannot be limited to that which would be suitable for the school cafeteria. *See Reno*, 521 U.S. at 874. On the other hand, the argument that Michigan's regulations prohibiting

out-of-state wineries from shipping wine to consumers advance the goal of preventing minors from obtaining alcohol through direct shipments does not withstand scrutiny because the same regulations expressly permit in-state wineries to bypass the three-tier system and ship their products directly to Michigan consumers.

Just as the mere possibility of mitigating alcohol abuse was not enough to save the Rhode Island regulation in *44 Liquormart*, that the Michigan law might mitigate youth exposure to wine, while affecting adult consumption of wine, is insufficient. Michigan's ban of direct sales to consumers by out-of-state wineries cannot pass constitutional muster under the Commerce Clause. The burden on adult speech is unacceptable when less restrictive alternatives would be effective in advancing the state's legitimate purpose. For the same reasons, the burden on interstate commerce is unacceptable when nondiscriminatory alternatives are available to Michigan to achieve its core goals of limiting youth access and promoting temperance. *See* Part IV, *infra*.

IV. A 2003 FTC Report on Direct Shipment of Wine Lists Many Nondiscriminatory Alternatives to Advance the States' Core Concerns.

Petitioners and *amici* argue that a ban on, or restrictions for, direct shipments by out-of-state wineries are the only manner in which a state can ensure that wine is not illegally shipped to minors or that taxes are not avoided. But a July 2003 FTC Report entitled "Possible Anticompetitive Barriers to E-Commerce: Wine"[25] ("FTC Report") identifies numerous reasonable nondiscriminatory alternatives that other states have implemented: (1) permit or license requirements for out-of-state shippers, including mandatory remittance of taxes; (2) labeling and delivery requirements that ensure wine is delivered only to adults; (3) state cooperatives for interstate use tax collection; (4) use tax reporting requirements on state income tax forms; and (5) enforcement mechanisms, including stiff requirements for non-compliance.

Permits. According to the FTC Report, several states that allow interstate direct shipments require out-of-state shippers to obtain a permit or license to ship wine directly to consumers.[26] FTC Report at 27. States often require that such license holders remit taxes on their shipments, comply with state regulations regarding labeling and delivery of shipments, and pay a license fee. *Id.* at 28-29. States can also require that a winery submit to the state's jurisdiction and comply with its alcohol shipment laws as conditions for receiving a license.[27] *Id.* at 27. New Hampshire, for example, allows any winery currently licensed in

[25] The FTC Report was signed by all five of the FTC's Commissioners and its major bureaus. FTC Report at i. Additionally, on October 30, 2003, a hearing was held in the House, *E-Commerce: The Case of Online Wine Sales and Direct Shipments: Hearing Before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce*, 108th Cong. 2 (2003) ("October 30, 2003 Hearing"), which focused on the FTC Report. During the hearing, certain Representatives found the FTC Report's findings, conclusions, and recommendations persuasive. *See, e.g.*, October 30, 2003 Hearing at 3 (Statement of Rep. Stearns: "If the FTC staff report's analysis holds true for markets other than just McLean, Virginia, I find it persuasive that States should pursue less restrictive forms of regulation of direct interstate wine sales than outright bans."); *id.* at 6 (Statement of Rep. Radanovich: "The FTC Report that we will hear today discusses the various methods some States and shipping companies use to protect children. Notably, the report states that there are no documented non-sting cases of juvenile access to wine shipments generated from on-line sales. . . . Given this and other favorable aspects of the FTC Report, I believe Congress has the responsibility to allow consumers the choice to purchase wine on-line and give this venue a chance to grow and expand.").

(Continued on following page)

[26] *See, e.g.*, Neb. Rev. Stat. § 53-123.15(4) (2004); Nev. Rev. Stat. §§ 369.450, .490 (2003); N.H. Rev. Stat. Ann. § 178:27 (2003); N.C. Gen. Stat. § 18B-1001.1 (2004); N.D. Cent. Code § 5-01-16(5) (1987); S.C. Code Ann. § 61-4-747 (Law. Co-op. 2003); Va. Code Ann. § 4.1-112.1 (Michie 2003); Wyo. Stat. Ann. § 12-2-204 (2003).

[27] *See, e.g.*, S.C. Code Ann. § 61-4-747(C)(6) (Law. Co-op. 2003); Wyo. Stat. Ann. § 12-2-204(d)(vii) (2003).

its state of domicile to apply for an interstate direct shipping permit with the New Hampshire Liquor Commission. N.H. Rev. Stat. Ann. § 178:27(I)(a) (2003).[28] Wyoming and other states employ similar licensing schemes. Wyoming allows direct shipments of wine to consumers if the out-of-state winery agrees to remit a tax of twelve percent of the retail price of each shipment of wine; pay a license fee of fifty dollars; and ship no more than a total of eighteen liters of wine to any one household per year. Wyo. Stat. Ann. § 12-2-204 (2003). In South Carolina, a licensed out-of-state winery must pay a four-hundred-dollar fee every two years, remit all taxes due to the state at the same rate as if the sale were made in South Carolina, and agree not to ship more than twenty-four bottles of wine each month to one person. S.C. Code Ann. § 61-4-747 (Law. Co-op. 2003). To ship into Nebraska, an out-of-state winery must pay a fee of five hundred dollars, remit a gallonage tax if a tax on the wine has not already been paid, and ship no more than nine liters per year. Neb. Rev. Stat. §§ 53-124(11); 53-160; 53-194.03 (2004).

Labeling. States can also impose labeling and delivery requirements similar to those imposed in retail stores to ensure that wine is delivered only to a legal adult. FTC Report at 29. Some states require that wine be shipped in boxes that are clearly marked "Alcoholic Beverages, adult signature (over 21 years of age) required."[29] States also

[28] The out-of-state winery may ship up to sixty individual containers of not more than one liter of wine to any consumer per year. N.H. Rev. Stat. Ann. § 178:27(III). All direct shippers must pay a fee of 8 percent of the retail price of wine shipments to the state liquor commission and file with the commission a monthly tax report showing all shipments of alcohol into New Hampshire, with copies of invoices attached. N.H. Rev. Stat. Ann. § 178:27(V). The winery must keep these records on hand for three years to allow the state to perform an audit of the direct shipper's filings upon request. *Id.*

[29] *See, e.g.*, N.H. Rev. Stat. Ann. § 178:27(II) (2003); N.C. Gen. Stat. § 18B-1001.1(c) (2004); N.D. Cent. Code § 5-01-16(5) (1987); S.C. Code Ann. § 61-4-747(c)(2) (Law. Co-op. 2003); Va. Code Ann. § 4.1-112.1(C) (Michie 2003); Wyo. Stat. Ann. § 12-2-204(d)(iii) (2003).

require that wine be delivered by common carrier (*e.g.*, UPS and FedEx), and that carriers obtain the signature of a legal adult upon delivery and verify the age of the recipient by requesting appropriate identification.[30] These measures place a duty on both the shipper and the carrier to ensure that wine is not delivered to a minor.

That some states that prohibit interstate direct shipping allow intrastate direct shipping shows that these states are able to exercise sufficient regulatory control over direct shipping through the labeling and delivery requirements outlined above. While Michigan prohibits interstate direct shipping, it allows in-state wineries to ship directly to consumers, provided that (1) shippers affix to the package a label clearly stating that the package contains alcohol and that an adult signature and identification are required upon delivery; and (2) the person who delivers the package verifies that the recipient is of legal age and has the proper identification. Mich. Comp. Laws § 436.1203 (2004). If these measures are sufficient to prevent in-state wine from being delivered to minors, surely these same measures are sufficient to prevent out-of-state wine from being delivered to minors. *See* FTC Report at 28.

Taxes. With regard to revenue collection concerns, the FTC Report found that measures such as "requiring out-of-state suppliers to obtain permits and to collect and remit taxes" protected tax revenues in a less restrictive manner than a direct ban on out-of-state shipments. FTC Report at 38. There are even more nondiscriminatory measures through which states can achieve this goal. States can work together to ensure increased collection of use taxes. New York, New Jersey, and Connecticut have a Cooperative Interstate Sales and Use Tax Administration

[30] *See, e.g.*, Nev. Rev. Stat. 369.450(2)(a)(1) (2003); N.H. Rev. Stat. Ann. § 178:27(II) (2003); N.C. Gen. Stat. § 18B-1001.1(c)(1) (2004); N.D. Cent. Code § 5-01-16(5) (1987); Va. Code Ann. § 4.1-112.1(C) (Michie 2003); Wyo. Stat. Ann. § 12-2-204(d)(iv) (2003).

agreement to exchange sales and use tax information.[31] Under the agreement, participating vendors selling taxable goods and services across state lines voluntarily agree to collect the neighboring state's use tax. Sharing information about customers and purchases, improves use tax collection and increases state revenues. Some states have revised state income tax forms to address the failure of consumers to remit use taxes because they are not aware of use tax laws. They have done so by adding a line on state income tax forms requiring taxpayers to report the amount of purchases the taxpayer made from mail-order catalogs and online retailers.[32]

Enforcement. If out-of-state shippers fail to comply with license requirements, labeling and delivery requirements, or tax remittance, states have multiple means of enforcement available. First, states attach stiff penalties to violations of direct shipment laws. New Hampshire, one of the states identified in the FTC Report as having effectively implemented less restrictive means,[33] revokes the shipping permit of a person found to be shipping wine to minors and charges that person with a Class B felony. *See* N.H. Rev. Stat. Ann. § 178:27(VII) (2003). If, as a condition to being licensed, a shipper has submitted to the state's jurisdiction, the state can sue the shipper in state court. If the shipper is an unlicensed violator, the state has federal jurisdiction to

[31] *Available at* http://www.tax.state.ny.us/pdf/publications/Sales/Pub32_1196.pdf (last visited September 21, 2004).

[32] *See* North Carolina 2003 Individual Income Tax Form D-400 *available at* http://www.dor.state.nc.us/downloads/individual.html (last visited September 21, 2004). Michigan, Maine, Vermont and many other states have added similar lines to their tax forms. *See, e.g.*, Michigan 2003 Individual Income Tax Form MI-1040, *available at* http://www.michigan.gov/treasury/0,1607,7-121-1748_1904_1916-70176–,00.html (last visited September 21, 2004); Maine 2003 Individual Income Tax Form 1040S-ME, *available at* http://www.state.me.us/revenue/incomeestate/homepage.html (last visited September 21, 2004); Vermont 2003 Individual Income Tax Form IN-111, *available at* http://www.state.vt.us/tax/forms/formsindividual.htm (last visited September 21, 2004).

[33] *See* FTC Report at 27, 31-36, 38, 40.

sue for an injunction under the Twenty-first Amendment Enforcement Act, passage of which was supported by many state officials. 27 U.S.C. § 122a; *see also* FTC Report at 30. Finally, the FTC Report notes that if the state contacts the Alcohol and Tobacco Tax and Trade Bureau (TTB),[34] about the violation, TTB can revoke the shipping winery's federal permit once it determines that the shipper's violation has a "pronounced impact on the regulatory and/or criminal enforcement scheme of the state in question."[35] Without a federal permit, wineries are unable to do business anywhere in the country.

Effect. States that have adopted a licensing scheme report few problems with tax collection. *See* FTC Report at 38-39. These states have found that wineries generally comply voluntarily with licensing requirements, and that current means of enforcement are adequate to deal with those wineries that knowingly or unknowingly violate the law. *Id.* Furthermore, state concerns about revenue collection from interstate wine shipments are disproportionate to the relatively small amount of revenue states gain from taxes on interstate shipments of wine. Many states with reciprocity agreements – allowing direct shipments of wine to be made only between other states that offer the same reciprocal privilege – forego tax collection on interstate wine shipments altogether. *See* FTC Report at 39 n.166. There is no indication that these states have suffered serious economic consequences as a result. *Id.*

Contrary to the protestations of petitioners and *amici* otherwise, the FTC Report found that states that have instituted any or all of the less restrictive measures described above have reported few or no problems with direct shipments to minors. *See* FTC Report at 32-33.

[34] Formerly the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

[35] ATF, Industry Circular No. 96-3, Direct Shipment Sales of Alcohol Beverages (Feb. 11, 1997), *available at* http://www.atf.treas.gov/pub/ind_circulars/ic_96.3.htm (last visited September 21, 2004); FTC Report at 30-31.

These states find that licensing, labeling, and delivery requirements are effective in ensuring that wine is shipped only to adults. *See id.*[36]

The proven success of the less restrictive measures reported by the FTC reveals the fallacy of Michigan's insistence that its ban on direct shipments by out-of-state wineries, but not in-state wineries, is the only way in which to protect minors, consumers, and its treasury. Michigan has the burden of demonstrating both that such a ban materially advances these goals and the unavailability of less restrictive alternatives. But the existence of many less restrictive alternatives through which Michigan can achieve all of its asserted goals demonstrates that Michigan can do neither.

CONCLUSION

The Court should affirm the judgment in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003).

---

[36] With regard to direct shipments of wine to minors, Wisconsin reported "no complaints" and concludes "both that online sales to minors is 'not a serious problem' and that minors can obtain alcohol more easily through 'bricks and mortar' stores." FTC Report at 32, tbl. 3 (quoting from Wisconsin's response to the FTC questionnaire, located in App. B to the FTC Report). Similarly, the New Hampshire Liquor Commission reported that "there may be some instances where [shipment to minors] is occurring but we have very little evidence in this area and do not believe this is a serious problem at this time. . . . [T]he high cost of shipping and the fact that the minor has to wait for wine to arrive makes purchasing wine at a local retail[er] more desirable." *Id.* (quoting from New Hampshire's questionnaire response in App. B). The Illinois Liquor Control Commission (ILCC) stated that it

> has received no reports regarding minors obtaining wine from out-of-state shippers . . . I do not believe many minors would opt to purchase wine online due to the increased cost over brink-and-mortar [sic] establishments and due to the product itself, as my experience indicates minors would probably choose to purchase other alcoholic products over wine. I believe the direct shipment of wine to minors is . . . not a serious problem.

FTC Report at 32 (quoting Illinois's response to FTC questionnaire in App. B to FTC Report).

Respectfully submitted,

ROY T. ENGLERT, JR.
ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP
1801 K Street, N.W.
Suite 411
Washington, DC 20006
(202) 775-4500

JOHN L. OBERDORFER*
ROBERT C. JONES
MEAGAN T. BACHMAN
COLLEEN HANRAHAN
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, DC 20037
(202) 457-6000

* *Counsel of Record*

SEPTEMBER 2004

APPENDIX

Senator Barbara Boxer (CA)
Senator Dianne Feinstein (CA)

Representative Howard L. Berman (CA)
Representative Timothy H. Bishop (NY)
Representative Sherwood L. Boehlert (NY)
Representative Lois Capps (CA)
Representative Chris Cox (CA)
Representative Calvin M. Dooley (CA)
Representative David Dreier (CA)
Representative Sam Farr (CA)
Representative Elton Gallegly (CA)
Representative Maurice D. Hinchey (NY)
Representative Richard W. Pombo (CA)
Representative George P. Radanovich (CA)
Representative Louise M. Slaughter (NY)
Representative Pete Stark (CA)
Representative Mike Thompson (CA)
Representative James T. Walsh (NY)
Representative Lynn Woolsey (CA)
Representative David Wu (OR)